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In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the subpoena provisions of the Fair Labor Standards Act, 29 U.S.C. 209 and 211, which authorize the Secretary of Labor to compel the production of documentary evidence without a warrant, violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

The Secretary of Labor and Al Godes and Loren Gilbert, two officers of the Department of Labor, were named as defendants in the district court and are appellants here.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (App. D, *infra*, 14a-15a) is not reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, 9a-10a) was entered on October 28, 1982. A motion to alter or amend the judgment was denied on November 24, 1982 (App. D, *infra*, 13a-14a). The notices of appeal to this Court were filed on December 15, 1982 (App. C, *infra*, 11a-12a). On February 4, 1983, Justice Blackmun extended the time within which to docket the appeal to and including April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See page 7 note 4, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 9 of the Fair Labor Standards Act of 1938, 29 U.S.C. 209, provides:

> For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance

of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees.

Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such

order of the court may be punished by such court as a contempt thereof.

STATEMENT

1. On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned appellee, a motel-restaurant located in Steele, North Dakota, and informed its manager, Susanne White, that he would commence an investigation of the establishment the following morning. He requested White to have available for inspection time, wage, and payroll records for all employees for the past two years (App. A, *infra*, 2a). The investigation was to be conducted pursuant to Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 211, and its purpose was to determine whether appellee was in compliance with the FLSA.[1]

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[1] Section 11 of the FLSA authorizes the Secretary of Labor to conduct investigations to determine whether any provision of the Act has been violated. Specifically, he is authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate." These investigatory powers are augmented by Section 9 of the FLSA, 29 U.S.C. 209, which, by incorporating by reference Sections 9 and 10 of the Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 49 and 50, authorizes the Secretary "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." In the event of refusal to comply with a subpoena, the Secretary "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence." Failure to obey any order of the court to produce documentary evidence "may be punished by such court as a contempt thereof." (Under Reorg. Plan No. 6 of 1950, 3 C.F.R. 1004 (1949-1953 comp.), *reprinted in* 5 U.S.C. App. at 743, all functions of all other officers of the Department of La-

After the investigation was rescheduled at the request of appellee, its attorney sent a letter to Godes inquiring about the scope of and reason for the investigation (App. A, *infra*, 3a). The Department of Labor, represented by Loren Gilbert, Assistant Regional Administrator for the Wage and Hour Division, replied by letter on January 20, 1982, outlining the general scope of an FLSA investigation, but refusing to give the motive for the investigation of appellee because the Secretary's investigatory powers under the FLSA do not depend upon the filing of a complaint (*id.* at 3a-4a). Gilbert also asked appellee to inform him if it intended to withhold consent for the rescheduled investigation, "so that I can request an administrative subpoena in order to conduct the investigation" (*id.* at 4a). Shortly thereafter, appellee's attorney informed Gilbert that appellee would not permit the investigation without a search warrant from an independent magistrate (*ibid.*).

Under instructions to attempt the investigation of appellee and, if permission was refused, to serve an administrative subpoena duces tecum, Godes entered the public lobby area of appellee's premises on February 2, 1982. When the manager did not appear, he served the subpoena on an employee of appellee (App. A, *infra*, 4a).[2] The subpoena, signed by the Administrator of the Wage-Hour Division, requested that an officer, agent, or employee having custody and personal knowledge of appellee's records appear to testify regarding appellee's wage practices and to produce certain records at the Wage-Hour office in Bismarck, North Dakota, on February 9, 1982. The request was specifically limited to certain records required by law to be kept by employers, namely, payroll data and sales records relevant to

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bor are transferred to the Secretary of Labor, although the Secretary is free to delegate those functions to other officers.)

[2] It is uncontested that appellee was properly served with the subpoena (App. A, *infra*, 4a).

whether the company was covered by the FLSA (*id.* at 5a; Stipulation of Facts No. 11).[3] Appellee's attorney subsequently informed the Department of Labor that appellee would not comply with the administrative subpoena on the ground that it was invalid under *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (App. A, *infra*, 5a).

2. Appellee challenged the validity of the subpoena by commencing this action against appellants, the Secretary of Labor, Godes, and Gilbert, in the United States District Court for the District of North Dakota. In its amended complaint, appellee sought to enjoin appellants from "entering [its] premises or seizing any of [its] property with an administrative [s]ubpoena, without obtaining a warrant." Second Verified Complaint at 4. Appellee's complaint also sought a declaratory judgment that the FLSA "is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative [s]ubpoena after entry to inspect has been denied." *Id.* at 5. On March 3, 1982, the Secretary petitioned the district court to compel appellee to comply with the administrative subpoena. The district court consolidated appellee's injunctive and declaratory judgment action with the Secretary's enforcement action.

The district court denied the Secretary's motion for summary judgment and granted summary judgment in favor of appellee in each case, holding that enforcement of the subpoena would violate the Fourth Amendment (App. A, *infra*, 1a-8a). The court first expressly found that "[t]he actions of the Secretary * * * unquestionably comport" with the provisions of the FLSA setting forth his investigative powers (*id.* at 6a). Hence, the

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[3] Regulations implementing 29 U.S.C. 211(c) require employers to keep the type of information requested. See 29 C.F.R. 516.2(a) (payroll information) and 516.5(c) (sales and purchase records).

court stated, the controlling issue was appellee's contention that "this statutory scheme is constitutionally impermissible," a contention based exclusively on *Marshall* v. *Barlow's, Inc.*, *supra* (App. A, *infra*, 6a).

The district court held that this Court's decision in *Barlow's*, which required a warrant based on probable cause prior to non-consensual searches of work areas under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), applies to FLSA investigations (App. A, *infra*, 7a-8a). Indeed, because there is a more compelling basis for proceeding with a warrantless safety and health inspection than one directed at compliance with wage and hour regulations, the court remarked that the reasoning of *Barlow's* "applies with equal—if not greater—force in the instant situation" (*id.* at 8a). Accordingly, the court concluded that "the Secretary * * * may *not* proceed to enter upon the premises of [appellee] for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant" (*ibid.*; emphasis in original). In effect, the court held unconstitutional Sections 9 and 11 of the FLSA, 29 U.S.C. 209 and 211, which, by reference to 15 U.S.C. 49, give the Secretary administrative subpoena power to inspect relevant documents without resort to a warrant.[4]

[4] Although the order and judgment of the district court do not expressly declare the FLSA unconstitutional, they clearly represent a holding of unconstitutionality. The court explicitly found that the subpoena was authorized by statute and that the question therefore was whether its enforcement was "constitutionally impermissible" (App. A, *infra*, 6a). There is no suggestion that the particular subpoena involved here was in any way invalid; hence, a determination of unconstitutionality "'was a necessary predicate to the relief that the lower court granted.'" *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980) (footnote omitted). The effect of the decision is to make officers of the United States "bound by a holding of uncon-

Because the language of the district court's order barred the Secretary from "enter[ing] upon [appellee's] premises" to inspect the records, the Secretary filed a motion to alter or amend the judgment (App. E, *infra*, 15a-17a) by ordering appellee to comply with the subpoena by producing the records at the place named therein—a location away from appellee's premises. The court denied the motion (App. D, *infra*, 13a-14a).

THE QUESTION IS SUBSTANTIAL

1. The decision of the district court holds unconstitutional the power conferred upon the Secretary of Labor by Sections 9 and 11 of the Fair Labor Standards Act of 1938 to compel by subpoena the production of relevant documents in connection with an FLSA investigation. At a minimum, the decision seriously interferes with the longstanding mechanism established by Congress to enforce important federal legislation designed to assure fair minimum labor standards. Requiring a warrant based on probable cause as a precondition to government inspection of payroll and wage records of an employer will severely impair the Secretary's ability to monitor compliance with the FLSA.

Moreover, the ramifications of the district court's decision, if it is permitted to stand, range far beyond the specific context of enforcement of fair labor standards. The subpoena provision of the FLSA simply incorporates by reference the subpoena provision of the Federal Trade Commission Act of 1914, 15 U.S.C. 49. Thus, as a practical matter, the decision below also invalidates the subpoena power of the FTC, as well as the subpoena powers of other governmental bodies who de-

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stitutionality" (*California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975)), and thus there is no doubt that direct appeal of the decision to this Court lies under 28 U.S.C. 1252.

rive their authority by reference to the FTC Act. See, *e.g.*, 42 U.S.C. (Supp. IV) 7255 (Department of Energy Act of 1978); 29 U.S.C. 1134(c) (Employee Retirement Income Security Act of 1974); 29 U.S.C. 521(b) (Labor-Management Reporting and Disclosure Act of 1959); 27 U.S.C. 202(c) (Federal Alcohol Administration Act); 21 U.S.C. 677 (Federal Meat Inspection Act).[5]

In sum, the district court's decision calls into question the constitutionality of the subpoena power across a broad spectrum of federal regulatory activity. This Court should grant review to remove the cloud placed on the validity of a long established investigative tool that is essential to enforcement of an array of important federal statutes.

2. Apart from the broad potential impact of the district court's decision, further review is required because the decision is manifestly erroneous. In the name of protecting against unreasonable searches and seizures, the decision strikes down a well established administrative enforcement system. Yet it does not significantly advance any legitimate privacy interest and is completely unsupported by established principles of Fourth Amendment jurisprudence. Indeed, the decision below is flatly inconsistent with a controlling precedent of this Court upholding the subpoena provisions of the FLSA, as well as more than 30 years of consistent decisions by this Court in analogous contexts.

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[5] In addition, the decision of the district court strongly suggests the unconstitutionality of subpoena powers under other statutes that also authorize compelling the production of records without a warrant although they do not expressly incorporate the FTC Act by reference. See, *e.g.*, 49 U.S.C. (Supp. IV) 10321(c) (Interstate Commerce Act); 47 U.S.C. 409(e) (Federal Communications Act); 30 U.S.C. 813(d) (Federal Mine Safety and Health Act); 29 U.S.C. 657(b) (Occupational Safety and Health Act of 1970); 29 U.S.C. (& Supp. V) 161 (National Labor Relations Act); 26 U.S.C. 7602 (Internal Revenue Code); 15 U.S.C. 1401(c) (National Traffic and Motor Vehicle Safety Act).

a. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), this Court rejected the contention that the subpoena power conferred by the FLSA violates the Constitution and, in particular, the Fourth Amendment (*id.* at 195-214). The Court recognized that the statute authorizes the examination of documents without a warrant based on probable cause, but it held that this does not violate the Fourth Amendment's proscription against "unreasonable searches and seizures." The Court stated that the execution of a subpoena for specific documents is not an "actual search and seizure" (*id.* at 195), and ruled that the requirements of the Warrant Clause of the Fourth Amendment do not apply to it. The Court explained that in enforcing a subpoena "[n]o officer or other person [seeks] to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections." *Ibid.* Rather, the Court held, the issuance of a subpoena is a "constructive search" (see generally *id.* at 202-208) that, to the extent the Fourth Amendment applies to it at all, is governed by the constitutional requirement that it not be "unreasonable." *Id.* at 208.

The "reasonableness" of an administrative subpoena, the Court explained, is guaranteed by safeguards different from the warrant based on probable cause required in other contexts to support "actual searches." 327 U.S. at 209. The abuses against which the Fourth Amendment guards in the subpoena context are "too much indefiniteness or breadth in the things required to be 'particularly described'" and whether "the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Id.* at 208. Affording the object of a subpoena the right to challenge its validity in court before enforcement protects

against this kind of abuse. *Id* at 209, 217. In the Court's words, protection analogous to the probable cause standard is provided in the subpoena context by "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry * * * [and] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry." *Id.* at 209. Accordingly, the Court held that, in the case of an FLSA administrative subpoena, "[i]t is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Id.* at 208-209.

Thus, *Oklahoma Press* unequivocally rejects the district court's holding that an FLSA subpoena is unconstitutional unless it is based upon probable cause. The principle of *Oklahoma Press*—that specific, relevant administrative subpoenas satisfy Fourth Amendment standards—has been repeatedly reaffirmed by this Court. See, *e.g.*, *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976); *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950). As the Court stated in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967) (footnote omitted): "[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."

The district court did not suggest that the subpoena here was unduly general or burdensome (and it cannot seriously be contended that it is), and the documents sought plainly are relevant to an investigation author-

ized by the FLSA. See *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 210. Rather, the court's decision rests solely on the proposition that *any* FLSA subpoena is invalid unless it is issued by a neutral magistrate based on probable cause (App. A, *infra*, 8a). Accordingly, the decision below seeks to obliterate "the traditional distinction between a search warrant and a subpoena" (*United States* v. *Miller*, *supra*, 425 U.S. at 446), and cannot be squared with the settled rule of *Oklahoma Press*.

b. The unstated premise of the district court's decision appears to be that *Oklahoma Press* and subsequent cases upholding administrative subpoenas were overruled sub silentio by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). That premise, however, is completely without foundation. *Barlow's* involved considerations quite different from those implicated by administrative subpoenas, and nothing said by the Court there casts any doubt on the validity of *Oklahoma Press*. Indeed, *Barlow's* relied heavily (see 436 U.S. at 312-313) on *See* v. *City of Seattle*, *supra*, which, while establishing an administrative warrant requirement for fire inspections, also confirmed the basic principle of *Oklahoma Press* that the Fourth Amendment constraints on an administrative subpoena duces tecum relate to relevance and burdensomeness, not probable cause. See pages 10-11, *supra*.

In *Barlow's*, this Court held unconstitutional the inspection powers conferred on the Secretary of Labor by the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), to search the work area of any employment facility for safety hazards and violations of OSHA regulations. The opinion in *Barlow's* makes clear, however, that the requirement that these searches be conducted pursuant to a warrant has no application to the "constructive search" involved in the enforcement of an

administrative subpoena. The Court's concern in *Barlow's* was with a broad administrative power to enter and inspect private premises, and the consequent invasion of privacy, that was unrestrained by any prior judicial review. The Court characterized the OSHA statute as "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. Moreover, the Court noted, the statute did not require the inspector to "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed." *Ibid.*; footnote omitted. A warrant requirement, the Court concluded, would obviate both of those problems by delimiting the scope of the search and "provid[ing] assurances from a neutral officer" that the proposed search was reasonable and authorized by statute. *Ibid.*; see also *Donovan* v. *Dewey*, 452 U.S. 594, 601 (1981).

These concerns are not implicated in the subpoena context. The FLSA subpoena does not confer unbridled discretion upon the officer in the field. It must be issued by the Wage-Hour Administrator, and, more important, it can be enforced only by resort to a court in which the subpeonaed party may raise objections to its reasonableness. See *See* v. *City of Seattle*, *supra*, 387 U.S. at 544-545. The subpoena is not open-ended like the search in *Barlow's;* it identifies the particular documents to be submitted. See *id.* at 544. And perhaps most important, a subpoena does not authorize or even require an entry onto the employer's non-public premises. Thus, the subpoena procedure itself provides the Fourth Amendment protection that the Court found lacking in *Barlow's* in the absence of a warrant, and, as the lower courts consistently have held, there is nothing in *Barlow's* that undercuts the long established validity of administrative subpoenas. See, *e.g.*, *Donovan* v. *Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981); *In*

re Grand Jury Proceedings, 601 F.2d 162, 168 & n.1 (5th Cir. 1979); *Marshall* v. *American Olean Tile Co.*, 489 F. Supp. 32 (E.D. Pa.), aff'd, 636 F.2d 1209 (3d Cir. 1980); *Marshall* v. *Walbridge*, 84 Lab. Cas. (CCH) ¶ 33,723 (N.D. Ind. 1978).[6]

The district court's decision that a search warrant must be used instead of a subpoena turns accepted Fourth Amendment principles on their head. It is generally recognized that a subpoena duces tecum, which allows the recipient of the subpoena (rather than a law enforcement officer) to search for the relevant documents, is substantially *less* intrusive of privacy interests than a search warrant. See, *e.g.*, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563 (1978); *id.* at 571, 573 (Stewart, J., dissenting). Indeed, despite *Barlow's*, some lower courts have held that, because of the additional safeguards provided by the subpoena process, Congress intended that OSHA inspectors always use a subpoena to inspect documents, and therefore they may not use a warrant for that purpose. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1130-1133 (3d Cir. 1982); *In re Inland Steel Co.*, 492 F. Supp. 1310 (N.D. Ind. 1980). These decisions highlight the error of the district court's invalidation on Fourth Amendment grounds of administrative subpoenas in favor of warrants.

Finally, the contention that the FLSA subpoena issued here violates the Fourth Amendment is made

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[6] The Court's opinion in *Barlow's* did note that its invalidation of OSHA's unrestricted statutory inspection power also applied to an inspection of documents. 436 U.S. at 324 n.22. That comment was made, however, in the context of an entry onto the employer's non-public premises to effect, *inter alia*, a broad inspection of documents in the absence of either a warrant or a subpoena. It certainly does not suggest that a warrant, rather than a subpoena, is necessary for every inspection of documents. Indeed, the Court's primary objection to the document search was the failure to "delineat[e] the scope of [the] search" (*ibid.*), a function that manifestly is performed satisfactorily by a subpoena.

even more untenable by the fact that the records sought are ones that are required by law to be maintained. See note 3, *supra*. Thus, the records have a public aspect that vitiates any claim by appellee of a reasonable expectation of privacy in their contents. See *United States* v. *Miller*, *supra*, 425 U.S. at 440-443; *Shapiro* v. *United States*, 335 U.S. 1, 32-36 (1948); *Donovan* v. *Mehlenbacher*, *supra*, 652 F.2d at 231. If the government is empowered to require employers to maintain certain records to help assure compliance with the FLSA, the government ought to be able to see those records without having to demonstrate probable cause that a statutory violation exists. In sum, the district court's invalidation of FLSA subpoenas on the ground that an inspection of documents is a "search" that may only be made pursuant to a warrant defies common sense and is directly contrary to longstanding precedents of this Court.[7]

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[7] Because the district court's opinion and judgment specifically bar the Secretary of Labor from "enter[ing] upon the premises of appellee" (App. A, *infra*, 8a; App. B, *infra*, 9a-10a), a superficial reading suggests that the court did not necessarily hold that inspection of the documents themselves would violate the Fourth Amendment, but rather held only that a physical entry onto appellee's premises to execute the subpoena would be unconstitutional without a warrant. Upon further examination, however, it is clear that such a reading is erroneous.

First, and foremost, the subpoena at issue specifically requested production of the documents at the local Wage-Hour office (see Stipulation of Facts No. 11), and thus the validity of an entry onto appellee's premises was not even before the court. The papers filed by the parties confirm that the issue litigated in the district court was the warrantless "search" involved in the *inspection* of the documents, rather than an entry that the government did not even seek. The stated basis for appellee's contention that the subpoena violated the Fourth Amendment was the allegation that the subpoena "purports to authorize inspection of [appellee's] records without a warrant or its equivalent * * * [and] probable cause." Second Verified Complaint at

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal. Cf. *FTC* v. *Crafts*, 355 U.S. 9 (1957).

Respectfully submitted.

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STEVEN J. MANDEL
Attorney
Department of Labor

APRIL 1983

3-4. The government emphasized in its papers that the subpoena did not require entry onto appellee's premises, stating that compliance officers "are instructed not to enter any non-public area of any establishment without the employer's permission" and that, if an employer does not want to have records reviewed on his premises, "compliance officers will agree to any other reasonable arrangements to review the records off the employer's premises." Memorandum in Support of Petition to Compel Respondent to Attend, Testify and Produce Documentary Evidence, at 13. Finally, the fact that the subpoena did not contemplate entry onto appellee's premises was again brought to the district court's attention in the government's Motion to Alter or Amend the Judgment (App. E, *infra*, 15a-17a). The court's denial of that motion (App. D, *infra*, 13a-14a) plainly demonstrates that its decision holds unconstitutional the use of an administrative subpoena to inspect documents even off the employer's premises.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

OCTOBER 28, 1982

A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

ORDER

These cases, which were consolidated for purpose of trial, are now before the Court on cross motions for summary judgment. All operative facts have been stipulated. The central issue, resolution of which is dispositive in both cases, is whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C., § 211) without having obtained a judicially issued warrant.

The facts agreed upon and material to a resolution of the issue stated, are as follows:

1. Section 11 of the Fair Labor Standards Act provides, *inter alia*, that officers of the Wage-Hour Division of the United States Department of Labor may enter upon the premises of certain business establishments and conduct investigations with an eye to compliance with the act and related regulations. In most cases, the compliance officer arranges an appointment with the owner or manager of the business establishment for that purpose.

2. The compliance officer is under instructions to review compliance throughout the particular establishment then being reviewed, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation. In the instant case, the investigation sought to be conducted is unlimited in scope.

3. On January 6, 1982, a compliance officer with the Wage & Hour Division of the Department, Al Godes, whose office is in Bismarck, North Dakota, telephoned Lone Steer, Inc., a motel-restaurant located in Steele, North Dakota, and informed its manager, Susann White, that he would commence an investigation of the establishment the following morning at 9:00 o'clock, A.M. He also told Ms. White to have available time, wage and payroll records for all employees for the last two years. Later that day, Mrs. White called Mr. Godes back and advised him that it was not convenient for Mr. Godes to conduct the investigation the following morning.

4. On January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had rescheduled the investigation of Lone Steer for January 14, 1982, at 9:00 o'clock, A.M.

5. On January 12, 1982, the attorney for Lone Steer, Richard G. Peterson, called Mr. Godes concerning the

investigation of Lone Steer. Mr. Peterson advised Mr. Godes that he might be able to meet with Mr. Godes at Lone Steer, but that he would get back to Mr. Godes to confirm.

6. The same day, January 12, Mr. Peterson set Mr. Godes a letter informing him that:

> I represent Lone Steer Cafe in Steele, North Dakota.
>
> Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).
>
> If, on the other hand, you propose a general administrative inspection for compliance—not prompted by specific complaint—we request to know the scope of the investigation.
>
> Until this matter is resolved, you do not have permission to conduct an investigation.

7. On January 14, Mr. Godes called Lone Steer, but was unable to reach Ms. White. Later that day, after Mr. Godes received the January 12 Peterson letter, Mr. Godes placed two more calls to Lone Steer, but was still unable to reach Ms. White.

8. Mr. Godes forwarded Mr. Peterson's January 12 letter to the Regional Office of the Wage & Hour Division in Denver, Colorado. On January 20, 1982, the Assistant Regional Administrator for the Wage & Hour Division, Loren E. Gilbert, sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will

not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941).

Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.

I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Mr. Godes was instructed to attempt the investigation in the company of Gerald Hill, Assistant Area Director, Denver.

9. Mr. Gilbert's letter was received by Mr. Peterson on January 25. On January 28, Mr. Peterson called Mr. Gilbert to reiterate that Mr. Godes did not have permission to investigate Lone Steer. Mr. Gilbert was also advised that a warrant from an independent magistrate would be required under the ruling of the Supreme Court of the United States in *Marshall* v. *Barlow's, Inc.* Mr. Godes was thereupon directed by Mr. Gilbert to attempt the investigation of Lone Steer and, in the likely event of refusal, to serve Lone Steer with an administrative subpoena duces tecum.

10. On February 2, 1982, at approximately 10:30 a.m., Mr. Godes, accompanied by Mr. Hill, entered the Lone Steer establishment in an attempt to conduct an investigation. After some delay, and in the absence of Ms. White, Mr. Godes served an administrative subpoena duces tecum on a Lone Steer employee, Karen Arnold. The parties are in agreement that Lone Steer, Inc., was properly served with the administrative subpoena duces tecum.

11. The administrative subpoena duces tecum was issued in Washington, D.C., on January 28, 1982, over the signature of William Otter, Administrator of the Wage and Hour Division, and directed to "any officer, agent or employee of Lone Steer, Inc., a corporation, ... having custody, personal knowledge, and information regarding the books, papers and documents described below."

12. On February 8, 1982, Mr. Peterson called Henry Mahlman, Counsel for the United States Department of Labor in Denver, Colorado, to advise that Lone Steer would not acknowledge and comply with the administrative subpoena duces tecum. This position was confirmed in a letter to Mr. Mahlman dated February 10, 1982. This letter stated:

> This letter is pursuant to our telephone conference on February 8, 1982 when I informed you that we view the Administrative Subpoena, attached hereto, issued by the Wage-Hour Administrator, U.S. Department of Labor, as invalid under the Fourth Amendment and the clear holding of Secretary of Labor *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 Sup.Ct. 1816, 56 L.Ed.2d 305 (1978). Accordingly, I further informed you that Lone Steer, Inc. would respectfully decline to respond to it. I also informed you that we are ready to defend against any motion or action the Labor Department deems appropriate to resolve the issue.
>
> The U.S. Supreme Court in *Barlow's* stressed the "presumptive" invalidity of warrantless inspections under regulatory statutes. We believe there is little doubt that a broad discovery device, a Subpoena, issued by the Department itself, cannot be utilized when entry to an employer's premises for purposes of a search and seizure is denied. As you recall, in *Barlow's*, your Department obtained a Court Order, under "compulsory-process" provisions of OSHA, which was held invalid under the Fourth Amendment.

> The issue is so important that we request that this matter be referred as expeditiously as possible to a forum for resolution. Accordingly, I am taking the extraordinary step of sending a copy of this letter to the U.S. District Court.

The actions of the Secretary, as described above, unquestionably comport with the provisions of the Fair Labor Standards Act, as amended, 29 U.S.C., § 201 *et seq.* Section 11(c) of the Act and its implementing regulations (29 C.F.R. 516) specifically authorize the Secretary's representatives to inspect, review and transcribe the records described in the administrative subpoena, and require Lone Steer to make those records available for such purposes. Section 9 of the Act (29 U.S.C., § 209) provides that, for purposes of such compliance investigations, the provisions of Sections 9 and 10 of the Federal Trade Commission Act are made applicable to the investigatory powers of the Secretary of Labor. Section 9 of the Federal Trade Commission Act (15 U.S.C., § 49) in turn establishes the authority "...to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation,..." and for the enforcement of such subpoenas by the courts of the United States. And, Section 10 of the Federal Trade Commission Act (15 U.S.C., § 50) makes refusal to comply with such a subpoena an offense punishable by fine or imprisonment, or both.

Lone Steer asserts that this statutory scheme is constitutionally impermissible, and that the records described in the administrative subpoena issued in this case need not be produced except in response to a warrant issued by a judicial officer upon a showing of probable cause. Lone Steer's exclusive authority for this position is the case of *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307.

The Secretary, on the other hand, contends that *Barlow's* does not erode previously established authority to the contrary and argues that that case has no application to Section 11 of the Fair Labor Standards Act.

A safety and health inspection under the provisions of OSHA (Occupational Safety and Health Act, 29 U.S.C., § 651 *et seq.*) was the object of an attempted warrantless entry upon the premises of Mr. Barlow's electrical and plumbing installation business. Upon the Secretary's petition, a show cause order was issued by the federal district court and, subsequent to a show cause hearing, the Secretary's application for an order compelling entry, inspection and investigation was granted. Mr. Barlow again declined to permit entry and inspection, basing his refusal on the absence of a search warrant. The case squarely presented the issue of whether the entry and inspection provisions of the Occupational Safety and Health Act are consistent and compatible with the prescriptions of the Fourth Amendment. A three-judge district court held that the inspection provisions of OSHA, insofar as they authorize warrantless inspections of those commercial establishments covered by the Act, are unconstitutional and in violation of the Fourth Amendment. See: *Barlow's Inc.* v. *Usery, et al.*, 424 F.Supp. 437 (D.C., D.Id. 1977).

The Supreme Court, in affirming the lower court decision, held that the Fourth Amendment prohibits unconsensual inspections in the work areas of business for the purpose of safeguarding employees against hazards; however, probable cause, in the criminal law sense, is not required as a basis for the issuance of a warrant. *Marshall, et al.* v. *Barlow's, Inc.*, 436 U.S. 307, 320. The probable cause which justifies the issuance of a warrant for the purpose of conducting an administrative search may be based not only on evidence of an existing violation of a statute or regulation, but may also

be found on a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967), quoted with approval in *Barlow's*, *supra*, at page 520.

The Secretary's argument that *Barlow's* does not apply to Section 11 investigations is untenable. It is reasonable to conclude that the exigencies of an entry upon commercial premises for the purpose of conducting a safety and health inspection designed to protect the personal well-being of employees supply more compelling bases for proceeding without a warrant than the circumstances presented here, where entry is sought for the purpose of determining compliance with wage and hour regulations. The reasoning of the Supreme Court in *Barlow's* applies with equal—if not greater—force in the instant situation.

In sum, I hold that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant.

Now Therefore, the Court having considered the cross motions for summary judgment, together with briefs and all other pertinent documents on file herein, and having concluded that there are no material facts at issue in either of the captioned cases, and that Lone Steer, Inc., is entitled to a judgment as a matter of law, it is

ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, in each one and both of the above captioned cases, be entered by the Clerk. No costs to either party.

Bismarck, North Dakota, this 27 day of October, 1982.

/S/ BRUCE M. VAN SICKLE

BRUCE M. VAN SICKLE, *Judge*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA—
SOUTHWESTERN DIVISION

Civil Action File No. A1-82-10

LONE STEER, INC.,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,

JUDGMENT

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

Dated at Bismarck, North Dakota, this 28th day of October, 1982.

CLETUS J. SCHMIDT, *Clerk*
By: DONALD E. EMINETH
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA—
SOUTHWESTERN DIVISION

Civil Action File No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

v.

LONE STEER, INC., A CORPORATION,

JUDGMENT

This action came on for (hearing) before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

Dated at Bismarck, North Dakota, this 28th day of October, 1982.

CLETUS J. SCHMIDT, *Clerk*
By: DONALD E. EMINETH
Deputy Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR; AND AL GODES, COMPLIANCE OFFICER WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants Raymond J. Donovan, Secretary of Labor, United States Department of Labor, and Loren Gilbert and Al Godes, Department of Labor, hereby appeal to the Supreme Court of the United States from the Judgment entered in the above-entitled action on October 28, 1982. A timely Motion to Alter or Amend was denied by an Order entered on November 24, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

Dated this 15th day of December, 1982.

RODNEY S. WEBB
United States Attorney

/s/ CHARLES S. MILLER, JR.
CHARLES S. MILLER, JR.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Petitioner Raymond J. Donovan, Secretary of Labor, United States Department of Labor, hereby appeals to the Supreme Court of the United States from the Judgment entered in the above-entitled action on October 28, 1982. A timely Motion to Alter or Amend was denied by an Order entered on November 24, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

Dated this 15th day of December, 1982.

RODNEY S. WEBB
United States Attorney

/s/ CHARLES S. MILLER, JR.
CHARLES S. MILLER, JR.
Assistant United States Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

ORDER

Under the provisions of Rule 59(e), Federal Rules of Civil Procedure, the Defendant-Respondent above named, Raymond J. Donovan, Secretary of Labor, has moved to alter or amend the order heretofore entered in this case on October 28, 1982 (file document #35). In support of his motion, the Secretary has submitted copies of two unreported cases: *Kulp Foundry, Inc.*, (3rd Cir., Nos. 81-2450 and 81-2451, October 28, 1982), and *U.S.* v. *New Orleans Public Service, Inc.*, (E.D.La., No. 73-1297, September 10, 1982).

In this Court's view, the cases above cited do not give support to the movant's position concerning the the central issue in these lawsuits.

Now Therefore, the Court having considered the pending motion to alter or amend, together with briefs and all other pertinent documents on file herein, and being well and sufficiently advised in all the premises, it is

ORDERED that said motion to alter or amend this Court's order of October 28, 1982, be, and the same hereby is, in all things *denied*.

Bismarck, North Dakota, this 24 day of November, 1982.

/s/ BRUCE M. VAN SICKLE
BRUCE M. VAN SICKLE, *Judge*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No.
A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., DEFENDANTS.

Civil Action
No. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

MOTION TO ALTER OR AMEND JUDGMENT

This motion is submitted by the Secretary of Labor pursuant to Federal Rules of Civil Procedure 59(e). The judgment in these consolidated cases was entered on October 28, 1982.

The alterations or amendments sought are necessary because the judgment, in its present form, is (1) not dispositive of Civil Action No. A1-82-24 and (2) affords relief not requested by any party and does not address the relief sought by the Secretary.

The Secretary moves to alter or amend the judgment as follows (proposed alterations or amendments are underlined):

"This action came on for hearing before the Court, Honorable Bruce M. Van Sickle, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant, and there are no material facts at issue in the case, therefore, Judgment is entered in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, with no costs to either party.

It is further Ordered and Adjudged that the Administrative Subpoena Duces Tecum, which requires the production, for inspection and copying by the Secretary of Labor, of records Lone Steer is required to maintain, at a location away from Lone Steer's premises, should be enforced. Lone Steer is directed to comply with the terms of said subpoena by producing such records at the place therein provided, on , 1982 at o'clock m."

The Secretary respectfully submits that legal authority heretofore submitted should be dispositive of this matter and that additional briefing, as provided by Rule 5 of the Rules of this Court, is not necessary.

The Secretary of Labor strongly believes oral argument would be of assistance to the Court, and accordingly respectfully requests permission to be heard on this motion.

Dated 3rd day of November, 1982.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

TEDRICK A. HOUSH, JR.
Regional Solicitor

/s/ HENRY C. MAHLMAN

HENRY C. MAHLMAN
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